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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/827,296	04/20/2004	Michael B. Zemel	31894-202098	2568
26694	7590	03/18/2008	EXAMINER	
VENABLE LLP			RICHTER, JOHANN R	
P.O. BOX 34385				
WASHINGTON, DC 20043-9998				
			ART UNIT	PAPER NUMBER
			1616	
			MAIL DATE	DELIVERY MODE
			03/18/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/827,296

Applicant(s)

ZEMEL ET AL.

Examiner

Edward J. Webman

Art Unit

1616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-7 and 10-15 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-7 and 10-15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 10/19/07.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1-7, 10-15 are rejected under 35 U.S.C. 102(a) as being anticipated by Zemel et al (FASEB J. , June 2000, 14(9) 1132-8.

Zemel et al. teach: 1) the body mass index (BMI) of the women of the NHAMES III study was 25.7 ± 0.4 (Table 1 at p. 1134), thus the women have Grade I obesity according to the specification at p. 10, paragraph 43; 2) the women had an energy intake of 1896 ± 68 kcal/day (Table 1 at p. 1134); 3) the 3rd quartile of women had a calcium intake of 773 ± 28 mg/day and $57.2 \pm$ servings/month (Table 4 at p. 1137). Zemel et al additionally teach the 4th quartile of women had a calcium intake of 1346 ± 113 mg/day and 102.8 ± 3.6 servings/month (Table 4 at p. 1137). Attenuation of the diabetogenic effect of a high fat diet is specified (p. 1135 right column first full paragraph). Stimulation of lipolysis is disclosed (page 1135 left column first full paragraph).

Claims 1-6 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for treating health problems, does not reasonably provide enablement for avoiding health problems. The specification does not enable any person skilled in the art to which it pertains, or with which it

is most nearly connected, to use the invention commensurate in scope with these claims.

Claim 1 is drawn to "A method of *avoiding* health problems..." where Webster's dictionary definition of "avoid" includes "to prevent the occurrence or effectiveness of". As such, the method would appear to encompass a method of preventing health problems. However, while the specification indicates that the claimed method may reduce the occurrence of health problems due to obesity, there is no indication that the claimed method can prevent health problems due to obesity.

Claims 1-7, 10-15 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

In the claim amendment filed on 11/21/06, claims 1, 7, 11, and 14 were amended to recite the limitations "administering...a sufficient amount of dietary calcium of at least about 773 mg per day...wherein...the one or more servings is at least about 57 servings of dairy per month. In the accompanying remarks at p. 6, top, applicant points to Table 4 of the specification (p. 18) as providing descriptive support for this limitation. Table 4 is reproduced below with the relevant portion highlighted. Because the limitation of "at least about" with respect to both 773 and 57 provides for variation (e.g., 10% of 773 or 57) that is greater than that provided in Table 4, I would say these limitations introduce new matter into the claims.

TABLE 4

Effects of dietary calcium, and dairy intake on the risk of being in the highest quartile of body fat for women ^a			
Quartile of calcium and dairy consumption	Calcium intake (mg/day: mean \pm SEM)	Dairy consumption (servings, month: mean \pm SEM)	Odds ratio of being in the highest body fat quartile
1	255 \pm 20	14.4 \pm 1.9	1.00
2	484 \pm 13	38 \pm 1.3	0.75 (0.13, 4.22) ^b
3	773 \pm 28	57.2 \pm 1.0	0.40 (0.01, 3.90) ^b
4	1346 \pm 113	102.8 \pm 3.6	0.16 (0.03, 0.88) ^b

^a Model is controlled for race/ethnicity and activity level, with age and caloric intake as continuous covariates.

^b 95% Confidence interval in parenthesis

Claim 6 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form.


It would appear that claim 6, claiming "a human", does not further limit claim 1, wherein claim 1 limits the individual to "a woman."

No claims allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Edward J. Webman whose telephone number is 571-272-0633. The examiner can normally be reached on M-F from 8 AM to 5 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, J. Richter, can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



EDWARD J. WERNAN
PRIMARY EXAMINER
GROUP 800